

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

STRUCTURES UNLIMITED, INC.,

Plaintiff,

v.

CIV S-04-1140 PAN (JFM)

FIRST NATIONAL SURETY COMPANY OF  
AMERICA, and DOES 1 through 10 inclusive,

Defendant.

ORDER

—○○—

On November 3, 2005, defendant First National Surety moved for summary judgment pursuant to Fed. R. Civ. P. 56 on plaintiff's complaint filed June 15, 2004 under the Miller Act, 40 U.S.C. § 3131 et seq. This case proceeds before this court by consent of the parties. 28 U.S.C. § 636(c); E. D. Cal. L. R. 73-301. Plaintiff is represented by Thomas M. Papez; defendant is represented by Matthew P. Shelton. As oral argument was unnecessary to resolve this matter, the hearing scheduled for December 14, 2005, was vacated and the court issues this order. E. D. Cal. L. R. 78-230(h).

Upon review of defendant's motion and all papers in support and opposition thereof, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

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1 I. BACKGROUND

2 Prior to November 2001, Buddy's Contracting Service, Inc. ("Buddy's")  
3 entered into a prime contract with the U.S. Navy to construct a concrete pad and enclosure over a  
4 sludge dewatering bed at the Marine Corps Mountain Warfare Training Center in Bridgeport,  
5 California. On October 15, 2001, defendant First National executed a payment bond for the  
6 benefit of Buddy's, guaranteeing payment to all subcontractors. 40 U.S.C. § 3131(b)(2).

7 On November 16, 2001, Buddy's subcontracted with plaintiff Structures  
8 Unlimited, Inc. ("Structures") for construction of the enclosure over the dewatering beds for a  
9 fixed price of \$239,700.00. Structures foreman James Murphy arrived at the site on August 13,  
10 2002, to commence work but discovered that the concrete pad necessary to commence  
11 installation of the enclosure was not completed by Buddy's and that a significant number of the  
12 laminated panels that were to be part of the enclosure were damaged. Structures commenced  
13 work five days later, when the pad was ready, and despite the need that several laminated panels  
14 be replaced. The parties agreed that the replacement panels would be installed in Spring 2003;  
15 they were in fact installed in July 2003. Nonetheless, a final inspection was conducted October  
16 1, 2002, and the Navy took possession on October 2, 2002. Pursuant to the parties' subcontract,  
17 Structures warrantied its work for one year commencing October 1, 2002; however, warranty was  
18 extended for a year commencing with the July 2003 installation.

19 Structures billed Buddy's for 100% of the work on August 14, 2002 ; while the  
20 bill included a notarized statement of project completion, a cover letter of the same date  
21 explained "we are currently on site installing our portion of the above mentioned project, and  
22 expect to be complete by the end of the month, with the possible exception of minor punch list  
23 items."

24 Buddy's paid Structures \$23,970.00 on September 30, 2002, and \$172,584.00 on  
25 November 29, 2002, leaving a balance of \$43,146.00 Buddy's filed for bankruptcy in January  
26 2004. On June 15, 2004, plaintiff filed this complaint seeking damages in the amount of

1 \$43,146.00, plus attorney fees and costs.

2 Defendant seeks summary judgment based on their assertion Structures'  
3 complaint was not filed within one year "after the day on which the last of the labor was  
4 performed or material was supplied" by Structures, as required by 40 U.S.C. § 3133(b)(4).

5 Defendant made the same assertion in its motion to dismiss, which this court  
6 denied on November 15, 2004, for the following reasons (at pp. 2-3):

7 The motion is based upon an exhibit to the complaint showing that Structures  
8 charged the full contract price by invoice dated August 14, 2002. In opposition,  
9 Structures points to paragraph 11 of the complaint wherein Structures alleged that  
10 "on or about July 24, 2003, after Structures had substantially performed its  
11 obligations under the subcontract, Buddy's breached the subcontract in that it  
12 failed to pay Structures." . . . It is not plain from the complaint that this action is  
time-barred. The contract, which is attached to the complaint, contains elaborate  
provision for payment that neither party has addressed. It is possible but not  
inevitable that all labor and material had been provided by August 14, 2002. It is  
equally possible that the last of the labor was performed or material supplied on or  
about July 24, 2003.

13 The only change in defendant's contention is the standard to be applied.  
14 Defendant asks the court to reconsider the issue based on the entire file and the facts which  
15 defendant alleges are undisputed. Plaintiff opposes the motion on the ground material facts  
16 remain disputed.

17 II. STANDARDS FOR A MOTION FOR SUMMARY JUDGMENT

18 Summary judgment is appropriate when it is demonstrated that there exists "no  
19 genuine issue as to any material fact and that the moving party is entitled to a judgment as a  
20 matter of law." Fed. R. Civ. P. 56(c).

21 Under summary judgment practice, the moving party  
22 always bears the initial responsibility of informing the district court  
23 of the basis for its motion, and identifying those portions of "the  
24 pleadings, depositions, answers to interrogatories, and admissions  
on file, together with the affidavits, if any," which it believes  
demonstrate the absence of a genuine issue of material fact.

25 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the  
26 nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary

1 judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers  
2 to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered,  
3 after adequate time for discovery and upon motion, against a party who fails to make a showing  
4 sufficient to establish the existence of an element essential to that party’s case, and on which that  
5 party will bear the burden of proof at trial. See id. at 322. “[A] complete failure of proof  
6 concerning an essential element of the nonmoving party’s case necessarily renders all other facts  
7 immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as  
8 whatever is before the district court demonstrates that the standard for entry of summary  
9 judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

10           If the moving party meets its initial responsibility, the burden then shifts to the  
11 opposing party to establish that a genuine issue as to any material fact actually does exist. See  
12 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to  
13 establish the existence of this factual dispute, the opposing party may not rely upon the  
14 allegations or denials of its pleadings but is required to tender evidence of specific facts in the  
15 form of affidavits, and/or admissible discovery material, in support of its contention that the  
16 dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party  
17 must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome  
18 of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
19 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir.  
20 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could  
21 return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433,  
22 1436 (9th Cir. 1987).

23           In the endeavor to establish the existence of a factual dispute, the opposing party  
24 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
25 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
26 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary

1 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a  
 2 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory  
 3 committee’s note on 1963 amendments).

4 In resolving the summary judgment motion, the court examines the pleadings,  
 5 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if  
 6 any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson,  
 7 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the  
 8 court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.  
 9 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to  
 10 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen  
 11 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.  
 12 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply  
 13 show that there is some metaphysical doubt as to the material facts . . . . Where the record taken  
 14 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no  
 15 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

### 16 III. ANALYSIS

17 40 U.S.C. § 3133(b)(4) provides:

18 An action brought under this subsection must be brought no later than one year  
 19 after the day on which the last of the labor was performed or material was  
 supplied by the person bringing the action.

20 In assessing when the “last of the labor was performed or material was supplied,”  
 21 the Ninth Circuit considers “whether the work was performed and the material supplied as ‘a part  
 22 of the original contract’ or for the ‘purpose of correcting defects, or making repairs following  
 23 inspection of the project.’” U. S. for Use and Benefit of Austin v. Western Elec. Co., 337 F.2d  
 24 568, 572-573 (9th Cir. 1964) (finding question of fact whether identified work was required to  
 25 “complete” the subcontract), quoting United States v. Gunnar I. Johnson & Son, Inc., 310 F.2d  
 26 899, 903 (8th Cir. 1962); accord, U.S. ex rel. J & A Landscape Co. v. Reza, Inc., 30 Fed. Appx.

708, 710 (9th Cir. 2002) (finding question of fact whether identified work “was performed before Final Acceptance, and, therefore, pursuant to its contractual obligations”); U.S. for Use and Ben. of Grinnell Corp. v. DNI, Inc., 106 F.3d 411, 1997 WL 30978, (9th Cir.1997) (finding that final inspection of sprinkler system by experienced technician was pursuant to the parties’ contract); U.S. for Use and Benefit of P.W. Berry Co., Inc. v. General Elec. Government Engineering & Management Services, 1994 WL 91977 (D.Ore. 1994) (finding question of fact whether identified labor was required by parties’ subcontract based on principle that “inspection of work already installed” or “correction of defective work” will not extend statutory period); T & A Painting, Inc. v. U.S., 673 F.Supp. 994, 996 (N.D.Cal. 1987) (finding “warranty work” equivalent to “repair work” outside the terms of the original contract).

Defendant relies on plaintiff’s own documents and oral representations, including billing statements, demands for full payment and statements of project completion, to argue that Structures performed the last of its labor and supplied the last of its material no later than September 7, 2002. Plaintiff asserts that it represented its work to be complete in order to make defendant’s billing cycle (“the 25<sup>th</sup> of the month”). Defendant also relies on a January 8, 2003 letter from the U.S. Navy contracting officer, which states that a final inspection was conducted on October 1, 2002; that the Navy “took possession of the work completed under the above subject contract on October 2, 2002;” that “the construction warranty period . . . commenced on October 1, 2002, and continues for one year;” the “warranty issues regarding the delaminating Kalwall roof and wall panels . . . forms part of the construction warranty” and requires an on-site meeting in spring 2003 to “evaluate and determine if any action or replacement of Kalwall panels are required;” and that any further work on the panels is to “be completed prior to the expiration of the contract warranty period on September 30, 2003.”

Plaintiff asserts it completed only ninety percent of its subcontract work by September 7, 2002, and that defendant’s site construction supervisor authorized completion of the remaining ten percent of the work in Spring 2003. Plaintiff relies, for example, on the

1 deposition of its foreman, James Murphy, that Jim Price, Buddy's site supervisor, authorized  
 2 Structures' delay until Spring 2003 to torque screws, caulk edges and flashing, and paint, which  
 3 Murphy testified was work required by the parties' contract, not warranty work. See Murphy  
 4 Depo., at pp. 35-37, 44-47. Plaintiff also asserts that it was required to warranty "the work" from  
 5 one year after the date of installation of the new panels in July 2003, although it is unclear  
 6 whether this "extended warranty" was on the entire enclosure or only the new panels, and how  
 7 this warranty satisfied the parties' contractual agreement that Structures provide only a one-year  
 8 warranty "from date of substantial completion of the installation of the total building."

9 Viewing the evidence most favorably to plaintiff,<sup>1</sup> the court finds that plaintiff has  
 10 demonstrated a genuine issue of material fact on the central question—for which plaintiff bears  
 11 the burden of proof—whether plaintiff's July 2003 installation of new panels and additional work  
 12 including torquing, caulking and painting, constituted the "last of the labor performed" or  
 13 "material supplied" within the meaning of 40 U.S.C. § 3133(b)(4). Questions of fact remain in  
 14 order to assess whether Structures' July 2003 work was "required to complete the subcontract" or  
 15 was "for the purpose of correcting defects or making repairs" under the subcontract. Austin,  
 16 supra, 337 F.2d at 572-573. This issue is properly submitted to the trier of fact at trial.

17 Accordingly, for the foregoing reasons, defendant's November 3, 2005 motion  
 18 for summary judgment is DENIED.

19 DATED: April 6, 2006.

20  
 21   
 22 UNITED STATES MAGISTRATE JUDGE

23 006:stru1140.ord  
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 25

26 <sup>1</sup> The court is required to view the evidence most favorably to plaintiff. See, Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1110, 1132 -1133 (9th Cir. 2003), quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1991) ("On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence").